In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 194

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court issued no opinion. The opinion of the court of appeals (Pet. App. 11–14) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1969. A petition for rehearing was denied on March 14, 1969. The petition for writ of certiorari was filed on June 4, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was required to pass upon difficult constitutional questions when it ap-

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peared that further proceedings might establish that petitioners were entitled to the relief they sought on non-constitutional grounds.

REGULATIONS AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of Executive Orders 9835 and 10450 and of the Attorney General's Rules of Procedure, 28 C.F.R. Part 41, are set forth in Appendix C to the Petition.

STATEMENT

Petitioners, the Veterans of the Abraham Lincoln Brigade ("Veterans") and three of its members, sought by an action for declaratory and injunctive relief in the United States District Court for the District of Columbia to have their organization's name removed from the Attorney General's list of organizations seeking to alter the form of the government of the United States by unconstitutional means. The organization was originally placed on that list pursuant to Executive Order 9835; notice of this designation was published in the Federal Register on October 21, 1948 (13 Fed. Reg. 6138). Subsequent to this Court's decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, Veterans was redesignated under Executive Order 10450; notice of this designation was published in the Federal Register of May 12, 1953 (18 Fed. Reg. 2741). Although the regulations governing designation provided that it could be contested within ten days of publication and the organization was at the time resisting an order that it register under the Subversive Activities Control Act, Pet. 3–4, Veterans never sought to contest this desig-

nation—as it had not the designation under E.O. 9835—until May 31, 1966. On that date, it formally requested the Attorney General to remove its name and the name of the Abraham Lincoln Brigade [1] from the E.O. 10450 list. That request was denied on July 6, 1966. The present suit was then filed.

On November 14, 1967, the district court entered a judgment granting a government motion for summary judgment and dismissing the complaint. Petitioners filed a notice of appeal, and then sought certiorari in advance of judgment in this Court, No. 1074, O.T., 1967, because of the pendency of the petition for a writ of certiorari in another case in which similar relief had been sought and denied in the same court. *Industrial Workers of the World* v. *Clark,* 385 F. 2d 687 (C.A.D.C.), No. 953, O.T., 1967. Certiorari was denied in *Industrial Workers,* 390 U.S. 948, and shortly thereafter in the present case, 390 U.S. 987.

In *Industrial Workers,* the court of appeals had upheld the district court's refusal to consider challenges to original designations under E.O. 9835 and E.O. 10450, in 1949 and 1953, respectively, on the grounds that the twelve years' delay in mounting those challenges constituted laches and that the failure to contest the designations when made constituted a failure to exhaust administrative remedies. It noted, however, that the Attorney General had provided informal procedures for delisting organizations when it appeared that circumstances had so changed that

[1] The Brigade is no longer in existence, having expired in 1938.

his original conclusion in listing them was no longer justified. The court noted a recent decision in which the Seventh Circuit had ruled that the government's evidence in a deportation case had been insufficient, in light of modern standards, to establish that the Industrial Workers of the World "was an organization advocating the alteration of the American government by unconstitutional means," 385 F. 2d at 690–691. In the light of these changed circumstances, and the "considerable development in public and judicial attitudes toward control of subversives" which had occurred since the listing, *id.* at 693, the court concluded in *Industrial Workers* that summary judgment in the government's favor had been improper on the issue whether the Attorney General had acted arbitrarily and capriciously in refusing to delist the organization; the case was therefore remanded to the district court for further proceedings. *Id.* at 693–694.

When the present case was heard in the court of appeals after this Court's denial of certiorari in advance of judgment, *supra,* the court found the same disposition appropriate here. The same inexcusable delay was found to have occurred between the original designations and the challenge to them, justifying refusal to consider that challenge. On the other hand, here, too, the organization had sought delisting under the Attorney General's informal procedures; delisting had been denied, and it was competent for the district court to determine whether that denial was arbitrary and capricious. And in the present case there were also new circumstances like those that the court of appeals in *Industrial Workers* considered

relevant to such a determination: the same "development in public and judicial attitudes toward control of subversives", *id.* at 693; the holding of this Court in *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board,* 380 U.S. 513, that an order to register made by the Subversive Activities Control Board required a reasonably current record, in view of an order's prospective effect, but that the record in that case was stale; and the subsequent agreement of the parties to abandon the effort to force registration. Accordingly, the court below remanded the case to the district court for further proceedings, holding that summary judgment on the delisting issue had been improper.

ARGUMENT

The court of appeals correctly concluded that this case was in all material respects identical to *Industrial Workers, supra.* Here, as there, petitioners have failed to show any reason why the Attorney General should now be put to the burden of proving that action taken by one of his predecessors sixteen years ago was correct, or why their failure to challenge that action for thirteen years should be excused. See also *Jones* v. *Summerfield,* 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841; *Landell* v. *Northern Pac. Ry. Co.,* 122 F. Supp. 253 (D.D.C.), affirmed, 223 F. 2d 316 (C.A.D.C.), certiorari denied, 350 U.S. 844; *National Lawyers Guild* v. *Brownell,* 225 F. 2d 552 (C.A.D.C.), certiorari denied, 351 U.S. 927. Here, as in *Industrial Workers,* the case has been remanded for the district court to consider whether the Attorney General's refusal to delist the organization upon its

application was arbitary or capricious in the light of the factors which the court of appeals considered cast doubt on the present sufficiency of the administrative record and raised a question of "changed circumstances." Thus, if the petitioners prevail in the proceedings that will follow, they will have the relief they are seeking in this court.[2]

Petitioners insist that the remand will be futile, because they raise no factual issues and seek a determination only of the constitutionality of the listing scheme. This Court has made clear, however, that courts "should not be forced to decide [such] constitutional questions in a vacuum." *W.E.B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309, 312. Petitioners sought particular relief—"removal of the Veterans and the Brigade from the Attorney General's list," Pet. 4—and it was competent for the court to require consideration of all possible bases for that relief; it need not have decided the question only on the grounds that petitioners would have preferred. As no final judgment adverse to petitioners has been entered on their complaint, review on certiorari is plainly unwarranted at this time, as it was at the same stage in *Industrial Workers, supra.*[3]

[2] There is no certainty that the Attorney General will be called upon to reconsider his refusal to delist; petitioners' assumption that the case will be mechanically remanded to him is unjustified. Moreover it is clear, in context, that the court's reference to "the current regulations," Pet. App. 12, is meant to refer to the informal procedures for delisting.

[3] There have been no further proceedings to date in *Industrial Workers.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

JULY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969